Supreme Court, U.S.
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IN THE

Supreme Court of the United States

David H. Marion, as receiver for
Bentley Financial Services, Inc.

Petitioner,

v.

Peninsula Bank, Joseph Marzouca,
Ted Benghiat, SFG Financial Services, Inc.,
and Southeastern Securities, Inc.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Third Circuit exceeded its authority and erred in creating a new federal common law defense (not based on the laws of any state and contrary to all federal precedent) to defeat the state law claims of a Receiver appointed at the request of the Securities and Exchange Commission, wherein: a) the jury found that Respondents had knowingly assisted the perpetrator of a nationwide Ponzi scheme by providing funds to the perpetrator so that the scheme could continue and b) the Court of Appeals accepted this jury finding but then overruled the jury finding of proximate cause by holding that the fact that the perpetrator of the scheme used the funds provided by Respondents to continue the scheme (as intended by Respondents) constituted a superseding, intervening cause absolving the Respondents of all liability both to the Receiver and to the investors defrauded by the scheme?

2. Whether an SEC Receiver for a corporation through which its sole shareholder operated a Ponzi scheme can recover on behalf of a corporation under Rule 10b-5 for the corporation's unmet obligations to its defrauded customers?

RULE 29.6 DISCLOSURE STATEMENT

At the request of the Securities and Exchange Commission, Petitioner was appointed as a Receiver in October 2001 by the United States District Court for the Eastern District of Pennsylvania. Petitioner is the Receiver for Bentley Financial Services, Inc., a Pennsylvania corporation once operated by Robert Bentley. Petitioner is also the Receiver of all the assets of Robert Bentley and Bentley's custodial entity known as "Entrust Group," which was a fictitious name for Robert Bentley. Bentley Financial Services, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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A. This is an issue of exceptional importance and likely to recur in that: i) This holding renders illusory the standing of SEC Receivers which the Panel purported to acknowledge; ii) This holding will impair the ability of SEC Receivers to perform their duties and iii) This holding will prevent valid claims by defrauded investors. 14

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OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, 1a-35a) is reported at 591 F.3d 137. The opinion of the District Court (App., *infra*, 36a-46a) is unreported.

JURISDICTION

The Court of Appeals judgment was entered on January 4, 2010. A timely Petition for Rehearing was denied on August 31, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(b) and Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated by the Securities and Exchange Commission, 17 C.F.R. §240.10b-5, are reproduced at App., *infra*, 57a-59a.

INTRODUCTION

The holding of the Court below – that one who gives funds to the perpetrator of a Ponzi scheme for the purpose of allowing the scheme to continue is absolved from liability when the perpetrator uses the funds to continue the scheme – is illogical and absurd.

In addition to being illogical and absurd, this holding:

A) exceeds the authority of the Court below by creating a federal common law

defense to defeat the state law claims of Petitioner and to overrule a jury finding of proximate cause; and

B) improperly creates a federal common law defense that is contrary to governing law and to precedents of this Court.

The Opinion states that it is "precedential". Reversal is therefore required, not only to correct the errors that have prejudiced Petitioner, but also because of the substantial adverse effect of the holding on the public interest:

A) Although the Court below purported to recognize the standing of Petitioner (an SEC Receiver), the holding renders such standing illusory. This will have a substantial adverse effect on other SEC Receivers who are now in the process of seeking to assert claims against third parties in the many Ponzi schemes that have been exposed during the financial crisis that began in 2008.

B) But the adverse impact of the holding does not end with SEC Receivers. The Opinion makes clear that its holding will also bar claims by defrauded investors themselves when they seek to hold accountable those who knowingly assisted other Ponzi schemes.

STATEMENT

In October 2001, following the collapse of a Ponzi scheme (the "Bentley Ponzi Scheme") which involved investors throughout the United States, the Securities and Exchange Commission ("SEC") filed a civil enforcement action against Robert Bentley ("Bentley"), Bentley Financial Services, Inc. ("BFS"), a Pennsylvania corporation of which Bentley was president and sole shareholder, and Entrust Group ("Entrust"), an unincorporated fictitious-name entity holding a bank account controlled by Bentley. At the request of the SEC, Petitioner David H. Marion was appointed in October 2001 by the District Court, pursuant to 28 U.S.C. § 754, as the Receiver for BFS, Entrust and all other Bentley assets. This Petition arises from Marion's actions to perform his duty, as an SEC Receiver, to recover from third parties the losses suffered by BFS, in order ultimately to compensate the investors defrauded by the Bentley Ponzi Scheme.

A. The Bentley Ponzi Scheme

Bentley's business as a broker of Certificates of Deposit ("CDs") involved selling unregistered BFS investment contracts to investors misrepresenting that they were FDIC insured CDs. Bentley caused BFS to promise each investor (a) return of principal on a specified maturity date and (b) a specified rate of interest. BFS incurred the contractual obligations to its customers but would not receive the benefit of any of the investor funds. Funds received from investors were diverted to Entrust Group, which was actually a bank account operated under a fictitious name

registered by Bentley, and comingled with funds from other investors.

Bentley carried on the Scheme in various ways: (a) many of the underlying CDs sold to investors were fraudulent; they did not in fact exist; (b) Bentley would sell the same CD position to different investors; (c) Bentley would purchase a CD for a five year term and sell the same CD to an investor for a one year term without disclosing the difference; (d) Bentley would sell "callable CDs" without disclosing the call feature and pay interest on the investment contracts if the underlying CDs were called; and (e) Bentley would sell "CDs" (actually custodial certificates) to investors with a higher interest rate than the underlying CD was paying.

The ability of BFS to pay the contractually promised interest and principal to its customers depended upon the financial stability of BFS rather than that of the banks that issued the underlying CDs Bentley purported to sell. Therefore, these custodial certificates actually sold constituted unregistered BFS investment contracts. (Court of Appeals Joint Appendix [hereinafter "J.A."] 435-436, 1096-1103 (Trial Trs.); 2010-2011 at ¶¶ 8-13 (Exhibit); 2013, 2016, 2021-2023, 2053-2054 (Exhibit 80, Expert Report of W. Burdette).

As noted in the Panel Opinion:

> Thus, though Bentley was in fact purchasing CDs-rather than simply recycling, or embezzling, the money he obtained from investors-his scheme still embodied some of

> the classic features of a Ponzi. In many cases, investors were not purchasing what they thought they were purchasing. Either (as in the case of the fictitious CDs) there was no underlying CD, or (as in the case of the CDs used as part of Bentley's mismatching strategy) the terms of the underlying CD did not match what had been disclosed to the investor. And Bentley's ability to make good on his obligations to his investors depended in significant part on his finding new investors.

591 F.3d at 142-43.

B. The Knowing Involvement of the Benghiat and Peninsula Bank Respondents in the Bentley Ponzi Scheme

Bentley's relationship with Respondents Ted Benghiat ("Benghiat") and SFG Financial, Inc. ("SFG"), Benghiat's CD brokerage business, began in 1993 or 1994. By 1996, when Bentley's business had unquestionably turned into a Ponzi Scheme, Bentley was doing approximately five to seven million dollars of CD business per month through Benghiat and SFG, and, by 2001, that business had increased to approximately twelve million dollars per month. Benghiat's securities firm, Southeastern Securities, Inc., ("SSI"), also served as the supervisory broker/dealer for Bentley between December 1998 and August 2000.

Benghiat had personal and business relationships with Respondent Joseph Marzouca ("Marzouca"), Peninsula Bank's executive vice-president, whom

Benghiat had known since 1986. Marzouca's first action as the new head of Peninsula's CD custody department was to negotiate a series of agreements with Benghiat's SFG. Benghiat was a stockholder of Peninsula Bank, and through Bentley's relationship with Benghiat and Benghiat's relationship with Marzouca, Entrust entered into a custodial relationship with Peninsula Bank whereby Peninsula Bank served as a custodian for the CDs Entrust held as purported custodian for BFS investors. As stated previously, "Entrust" was actually a bank account controlled by Robert Bentley.

During the Ponzi Scheme, Bentley was often in desperate need for cash to pay back BFS customers whose purported "CDs" had matured and who were unwilling to renew them. The Benghiat Respondents, knowing of this desperate need for cash, engaged in open market transactions at Bentley's request whereby Benghiat sold CDs for Bentley that were, in fact, owned by investors, to raise money so that Bentley could continue the Ponzi Scheme by paying other investors whose CDs had matured. (J.A. 469-471) (Trial Tr.). These sales also provided more income to the Benghiat Defendants. (J.A. 2020) (Exhibit – Burdette Report).

Benghiat also handled complaints from other brokers concerning the terms of the CDs Bentley was selling. Investors generally did not have any contact with Respondents. Indeed, the investors who were witnesses at trial testified that they had no contact with Respondents. However, a few investors did contact Peninsula Bank. The Peninsula Defendants directed to Benghiat those investors who called Peninsula Bank questioning investments allegedly held by Entrust at

Peninsula; Benghiat would pass those inquiries on to Bentley, who would pay out the investor and thus stifle a possible complaint to the SEC.

In addition, as noted in the Panel Opinion, "on three occasions Benghiat and Marzouca helped Bentley obtain the cash necessary to keep Bentley's operation afloat." 591 F.3d at 143. Benghiat, **acting as agent for Peninsula Bank**, arranged three transactions (in 1999, 2000, and 2001), not with BFS, but with the purported "custodian" Entrust; i.e., with Robert Bentley.

As described by the Court of Appeals:

> Benghiat spoke with Marzouca, and together the three parties engineered what they styled as a "warehousing" transaction between Bentley's operation and Peninsula Bank. Under the arrangement, Peninsula Bank agreed to purchase temporarily up to $10 million in CDs from Bentley in exchange for (1) a non-refundable $100,000 fee to be split between Marzouca and Benghiat, (2) interest on the CDs plus any shortfall between such interest and the prevailing prime rate of interest, and (3) a $1 million security deposit from Entrust intended to cover the difference (if any) between the purchase price of the CDs and the amount for which Peninsula Bank resold them. The deposit was subject to forfeiture if the Bank failed to sell all the CDs within 120 days. Bentley sold $6.8 million in CDs to Peninsula Bank under this arrangement in October and November 1999,

> repurchasing them within 120 days at a total loss in fees and interest of approximately $300,000. Two more warehousing transactions at virtually the same terms followed in 2000 and 2001.

591 F.3d at 144.

C. The Receiver's action against the Benghiat and Peninsula Respondents

As stated previously, the SEC brought a civil enforcement action against, **inter alia**, Bentley, BFS and Entrust in October, 2001. Bentley did not contest the allegations of the Complaint and admitted the existence of the Ponzi Scheme. Pursuant to the SEC policy to have Receivers appointed to collect the assets and, where appropriate, to bring third party actions against those who knowingly assisted the primary wrongdoer, the SEC requested the appointment of Petitioner as Receiver.

At the time of the Receiver's appointment, there were approximately 222 investors (customers of BFS) who had not been paid the principal and interest due them pursuant to their contracts with BFS. (J.A. 2695, 2697) (Exhibit – Receiver's Report of Allowed and Disallowed Claims).

Petitioner Marion, as Receiver of BFS, filed a Complaint against the Peninsula and Benghiat Respondents. The Complaint alleged damage to BFS arising from the Ponzi Scheme and contained multiple claims arising out of the common factual assertion that

those Defendants had provided knowing assistance to the Bentley Ponzi Scheme.

At trial, the Receiver presented evidence that Benghiat and Marzouca, the officer of Peninsula Bank, had actual knowledge of the Bentley Ponzi Scheme or were "willfully blind" to the existence of the Ponzi Scheme. This evidence included, **inter alia**:

a. testimony from Benghiat's compliance officer in which he admitted that Benghiat terminated Bentley as a registered representative because "Bob [was] a crook";

b. testimony from Robert Bentley that Benghiat knew that Bentley's financial statements were false;

c. evidence that Benghiat was the agent of Peninsula Bank and therefore that Benghiat's knowledge should be imputed to Peninsula Bank;

d. evidence that Peninsula Bank fired Marzouca after the Ponzi Scheme was exposed and would not release Marzouca from liability; and

e. expert testimony that what Peninsula Bank did was equivalent to receiving stolen property.

Petitioner also presented evidence that Benghiat and Marzouca (and, therefore, the corporate Respondents) knowingly aided and abetted Bentley's fraud by *inter alia*:

a. providing Bentley with funds to allow the Scheme to continue;

b. accepting as collateral for the loans actual CDs that Respondents knew Bentley did not own;

c. giving a false appearance of legitimacy to Bentley's operations; and

d. misleading regulatory authorities and brokers as to Bentley's actual operations.

As to causation, the Receiver presented:

a. expert testimony that, without the three loans that Benghiat arranged as agent for Peninsula Bank, investors denied the payments due them would have gone to the SEC and the Ponzi Scheme would have ended. (J.A. 1279-1281); and

b. expert testimony that the Ponzi Scheme would have collapsed but for the acts of the Peninsula and Benghiat Defendants. (J.A. 1279-1283).

Respondents testified that they had no knowledge of the Ponzi Scheme and offered rebuttal expert testimony on causation, contending that the Scheme would have continued without the loans.

The Receiver presented expert testimony to support three alternative claims for damages to BFS. The claim accepted by the jury was the "new money" claim, based on the principal ($23,329,785) and interest ($9,444,545) contractually owed by BFS to its customers.

D. The Jury Instructions of the District Court

The District Court repeatedly and clearly instructed the jury that for the jury to answer "yes" to the liability interrogatory for either of the two sets of Defendants, the jury must first find that those Defendants had actual knowledge of the Ponzi Scheme or were willfully blind to the Ponzi Scheme.

The Court specifically instructed:

a. that to answer "yes" to the liability interrogatory the jury must find that the Defendants "knowingly enabled Mr. Bentley to continue this fraudulent scheme" (J.A. 1896);

b. that "the issue" is "whether the bank and the Benghiat Defendants respectively either had actual knowledge that Mr. Bentley was engaged in fraudulent activities ... or that they had enough knowledge so that they intentionally decided not to inquire" (J.A. 1897);

c. that to answer "yes", the jury must find either actual knowledge or "that [the Defendants] intentionally chose not to find [out] because they suspected that he was engaged in a fraudulent scheme and didn't want to know about it" (J.A. 1898); and

d. that a "yes" answer requires either that the Defendants "knew or deliberately chose not to know" (J.A. 1903).

As to proximate cause, the Court instructed the jury that a "yes" answer to the liability interrogatory also

required the jury to find "that the conduct of a defendant was a substantial factor in bringing about the harm" (J.A. 1903). The court explained: "If you find that the harm would have occurred even without the defendant's conduct, then there is no liability because the plaintiff's harm would not have been caused by the defendant." (J.A. 1903-04).

E. The Verdict and Post-Trial Motions

The jury answered "yes" to the two liability interrogatories. 591 F.3d at 145, n. 11. Having accepted the "new money" damages theory, the jury allocated that sum on a percentage basis between the two sets of Defendants.

The District Court denied the Defendants' post-trial motions and also denied the Receiver's motion to mold and amend the verdict to cause the percentages allocated to each set of Defendants to be the joint and several liability of all Defendants since the jury had found that the Defendants were intentional tortfeasors (App. 36a-46a).

F. The Reversal By the Court of Appeals

Prior to the oral argument in the Court of Appeals, the Panel requested additional briefing on whether the Receiver had standing and to comment on the applicability of this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972) (holding that a receiver did not have standing to assert claims of investors). The oral argument was devoted almost exclusively to the issue of standing, and

the Panel requested post-argument briefing as to the standing of a SEC Receiver.

In its Opinion, the Panel:

a. stated that it was "less comfortable" with the Receiver's standing but ultimately concluded that the Receiver had standing;

b. assumed for purposes of the Opinion that there was sufficient evidence to support the jury's verdict that Respondents were intentional wrongdoers;

c. did not challenge the expert testimony that but for the knowing assistance of Respondents the Scheme would have collapsed; and

d. overruled the jury's finding as to proximate cause and held that the fact that Bentley used the funds supplied by Respondents to continue the Scheme (which the jury found was the intent of Respondents), constituted a superseding intervening cause, absolving the Respondents of all liability. As stated by the Panel: "The losses BFS suffered as a result [of funds being provided by Respondents] were proximately caused by Bentley's subsequent actions, not the cash infusion itself" (591 F.3d at 151; footnote omitted).

As to the Federal securities law claim, the Panel Opinion, ruling on an issue of law that had not been raised by Benghiat and accordingly had not been briefed by the Receiver, also concluded that BFS, the corporation Bentley used to perpetrate the Ponzi

Scheme, could not establish the third element necessary for a securities fraud claim under Rule 10b-5: "that it [BFS] was caused harm through its reliance on Bentley's deceit," and therefore that Benghiat could not be secondarily liable under Section 20(a) of the Securities Exchange Act of 1934 for Bentley's violations of Rule 10b-5.

REASONS FOR GRANTING THE PETITION

I. The new federal common law defense created by the Court of Appeals holding that the subsequent continuation of a Ponzi Scheme by the primary wrongdoer after receipt of funds from knowing aiders and abettors for the purpose of allowing the scheme to continue constituted an intervening act absolving these wrongdoers from any liability: a) is an issue of exceptional importance likely to recur; and b) exceeds the authority of the Court and is contrary to established precedent.

A. This is an issue of exceptional importance and likely to recur in that: i) This holding renders illusory the standing of SEC Receivers which the Panel purported to acknowledge; ii) This holding will impair the ability of SEC Receivers to perform their duties and iii) This holding will prevent valid claims by defrauded investors.

The Opinion states that it is "precedential". The Panel's "superseding cause" holding will have a substantial adverse impact on SEC Receivers, many of

whom are now working to hold accountable those who knowingly assisted other nationwide Ponzi schemes. The SEC has explained that one of the "prime purposes" of an SEC Receiver is to provide the "**maximum benefit for defrauded investors**" and that one of the "key means" a Receiver has to accomplish this is by "suing on behalf of the entity to recover property and to *seek damages from third parties*." Statement of the SEC, *Amicus Curiae,* in *Sanville v. Bank of Am. Nat. Trust & Sav. Assoc.*, No. 00-56796, 2001 WL 34135284 at 3 (9th Cir. 2001) (italic emphasis added). Unless reversed, the Panel holding will render illusory the standing of SEC Receivers (which the Panel purported to acknowledge) by preventing them from carrying out their duties to recover damages for the benefit of investors where third parties have knowingly aided and abetted the primary wrongdoer by providing funds so that the wrongdoing could continue.

Moreover, although the Panel purported to limit its newly created superseding cause defense to Receiver claims by stating that "[a]n investor suit might bring in a wider scope of activity than this one" (591 F.3d at 151 n.20), the investor testimony at trial made clear that those investors had **no** contact with Respondents and were unaware of any contract between Respondents and Bentley. Indeed, they had no knowledge of Respondents ("Do you know who Southeastern Securities is?" A. "No.") ("I don't know what Southeastern Securities is.") Contrast this testimony with the evidence at trial that Benghiat was in daily contact with Bentley. Indeed the "wider scope of activity" by Respondents was with BFS, not the investors. If this new federal common law defense bars claims on behalf of BFS, which had daily contact

with Respondents, it also clearly bars claims by investors, most of whom had no contact with Respondents.

In *SEC v. Sharp*, 315 F.3d 541, 543-44 (5th Cir. 2003), the Court noted that no investor "was able to attest to any direct contact with the Bank" and there was no evidence of any duties by the Bank to the investors. Peninsula Bank asserted that very position at trial. (J.A. 818-819, 883-884) (Trial Tr.); (J.A. 1951) (Exhibit) The result of the Panel Opinion is that even though the jury found the Respondents to be intentional tortfeasors who assisted a criminal enterprise that damaged BFS, they will have no liability to anyone.

B. The Federal common law defense created by the Panel exceeds the authority of the Court and is contrary to relevant precedents and to decisions of this Court.

It has long been the law that there "is no federal general common law" and "no clause in the Constitution purports to confer" the power upon the federal courts to "declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or part of the law of torts." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 1994 (1938).

Although *Erie* specifically applied to cases within the federal courts' diversity jurisdiction, this Court has repeatedly expanded this holding and rejected arguments that federal common law should govern in other circumstances, including a case brought by the

FDIC as a receiver of a federally insured bank ("FDIC Receiver") alleging tort-liability against attorneys who provided services to the bank currently in receivership. *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). In *O'Melveny*, this Court rejected the notion that federal common law should govern the FDIC Receiver's claims and held that state law governed "[w]hat sort of tort liability to impose on lawyers and accounts in general, and on lawyers and accountants who provide services to federally insured financial institutions in particular . . ." *O'Melveny & Meyers v. FDIC*, 512 U.S. at 89.

Petitioner's state law claims arose under the laws of Pennsylvania (where Bentley directed the Scheme) and Florida (the residence of the Respondents and where most of their acts took place). The Panel did **not** purport to apply the laws of either of these states in announcing its "superseding cause" rule. What the Panel has done is to create improperly a federal common law defense that is contrary to precedent and to common sense.

Decisions of Pennsylvania and Florida provide that an aider and abettor "is subject to liability for harm to a third person **arising from the tortious conduct of another**" where: (1) there is an underlying tort; (2) knowledge of that tort by the aider and abettor; and (3) substantial assistance or encouragement by the aider and abettor in effecting that tort. *See, e.g., Koken v. Steinberg*, 825 A.2d 723, 731-32 (Pa. Commw. Ct. 2003), *app. denied*, 834 A.2d 1103 (Pa. 2003) (emphasis added); *accord Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1568-1569 (S.D. Fla. 1990), *amended on other grounds by* 741 F. Supp. 220 (S.D. Fla. 1990).

Decisions of this Court are in complete agreement. *See, e.g., Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (U.S. 1994) (holding that there is no private right of action for aiding and abetting under the securities laws, but noting that aiding and abetting creates liability "for harm resulting to a third person *from the tortious conduct of another*" and referring to *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) as a "comprehensive opinion on the subject") (italic emphasis added); *Halberstam*, 705 F.2d at 477, 484 (holding that "the party *whom the defendant aids* must perform a wrongful act that causes an injury" and "that a person who assists a tortious act may be liable for other reasonably foreseeable acts done in connection with it.") (italic emphasis added).

II. The holding by the Panel that Rule 10b-5 liability cannot exist if the perpetrator of the fraud is a corporate insider utilizing a corporate entity that the perpetrator controls is contrary to the decisions of this Court and other Circuits and also involves an issue of recurring importance.

The Panel also held that the Benghiat Respondents could not be liable under § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), because Bentley's duty not to defraud under Rule 10b-5 could not run to BFS. The Panel Opinion stated that the corporation could not rely on Bentley's fraud, 591 F.3d at 152. This holding involved an issue of law that had not been raised by any of the appellants in the Court of Appeals briefing and accordingly was never briefed by

the Petitioner Receiver.[1] The Panel's holding is in direct conflict with a decision of this Court and decisions of the First and Second Circuits. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10, 12 (U.S. 1971) (holding corporation had 10b-5 cause of action against its sole[2] shareholder for sale of corporation's securities and noting that whether "the fraud was perpetrated by an officer [of the same corporation] and his outside collaborators is irrelevant to our problem. . . . And the fact that creditors of the defrauded corporate buyer or seller of securities may be the ultimate victims does not warrant disregard of the corporate entity."); *see also, e.g., Estate of Soler v. Rodriguez*, 63 F.3d 45, 54 (1st Cir. 1995) ("It is by now well established that a corporation has a claim under §10(b) if the corporation was defrauded in respect to the sale of its own securities by

1. Pursuant to Federal Rule of Appellate Procedure 28(a)(5) and (9) and "Third Circuit Local Appellate Rule 28.1(a), [the Peninsula and Benghiat defendants-appellants were] required to set forth the issues raised on appeal and to present argument in support of those issues in their opening brief." *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993). Where a party has "failed to raise the theory at issue on appeal", the Court's "consideration of that theory would *vitiate* the requirement of the Federal Rules of Appellate Procedure and our own local rules...." *Simmons v. Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991) (italic emphasis added) (announcing judgment of the Court) (Becker, J.). The Third Circuit has repeatedly held that it will not vitiate those rules "absent extraordinary circumstances." *Id.* No such "extraordinary circumstances" existed here.

2. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 300 F. Supp. 1083, 1092 (S.D.N.Y. 1969), *aff'd* 430 F.2d 355 (2d Cir. 1970), *rev'd* 404 U.S. 6 (1971).

some or even all of its directors."); *Goldberg v. Meridor*, 567 F.2d 209, 215 (2d Cir. 1977).

As the Second Circuit has stated "[t]here can be no more effective way to *emasculate the policies of the federal securities laws* than to deny relief solely because a fraud was committed by a director rather than by an outsider." *Ruckle v. Roto Am. Corp.*, 339 F.2d 24, 29 (2d Cir. 1964) (italic emphasis added) (rejecting "such clichés as the directors constitute the corporation and a corporation . . . cannot defraud itself.").

III. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 29, 2010

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 591 F.3D 137 (JANUARY 4, 2010)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-5173, 06-5196, 07-1010,
07-3398, 07-3416

Argued December 1, 2008.
Opinion filed January 4, 2010

591 F.3d 137 (2010)

DAVID H. MARION, as receiver for
Bentley Financial Services, Inc.

v.

TDI INC, (f/k/a Traders and Dealers, Incorporated, f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc.); SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

Appendix A

SANFORD GOLDFINE; S.D. GOLDFINE & CO.;
(Third-Party Defendants) (D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for
Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, Inc.; (D.C. No. 02-cv-07076)

Peninsula Bank; Joseph Marzouca,
Appellants (No. 06-5173)

DAVID H. MARION, as receiver for
Bentley Financial Services, Inc.

v.

TDI INC., (f/k/a Traders and Dealers, Incorporated, f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc.); SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

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Bentley Financial Services, Inc.

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S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; JERRY MANNING; JOSEPH MARZOUCA; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.; (D.C. No. 02-cv-07076)

Southeastern Securities, Inc.; SFG Financial
Services, Inc.; Theodore Benghiat, Appellants
(No. 06-5196)

DAVID H. MARION, as receiver for
Bentley Financial Services, Inc.,
Appellant (No. 07-1010)

v.

TDI INC., (f/k/a Traders and Dealers, Incorporated,
f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc.

and f/k/a U.S. Central Securities, Inc.); SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

SANFORD GOLDFINE; S.D. GOLDFINE & CO.; (Third-Party Defendants) (D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; JERRY MANNING; JOSEPH MARZOUCA; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.;
(D.C. No. 02-cv-07076)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

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Peninsula Bank; Joseph Marzouca, Appellants (No. 07-3398)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

Appendix A

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DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

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S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.; (D.C. No. 02-cv-07076)

Southeastern Securities, Inc.; SFG Financial Services, Inc.; Theodore Benghiat, Appellants (No. 07-3416).

Appendix A

Before: AMBRO, WEIS, and VAN ANTWERPEN, Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

A receiver for a corporation through which a Ponzi scheme was run brought suit against various third-parties alleged to have assisted the scheme, ultimately winning a multi-million-dollar jury verdict. The receiver's theory of the case was that the defendants, in concert with the corporation's chief officer, had harmed the corporation by saddling it with additional liability to the scheme's victims. Following a verdict in the receiver's favor, the defendants unsuccessfully moved for judgment as a matter of law, arguing, among other things, that the receiver lacked standing to bring the claims submitted to the jury and that the evidence was insufficient to support the jury's verdict. We agree with the receiver that, under our case law, he had standing to bring the claims presented to the jury. But we agree with the defendants that they cannot be liable to the corporation on the facts presented at trial. Accordingly, we vacate the District Court's denial of the defendants' post-trial motion for judgment of law and remand with instructions to enter judgment in their favor.

Appendix A

I. Facts and Procedural History

A. The Bentley Scheme

In 1986, Robert Bentley established Bentley Financial Services, Inc. ("BFS"), a Pennsylvania corporation, through which he brokered bank-issued certificates of deposit (CDs).[1] In 1993, Bentley formed the Entrust Group ("Entrust"), a Pennsylvania sole proprietorship, to act as custodian on BFS-brokered transactions. In the CD-selling industry, the broker is responsible for connecting CDs available for purchase from banks with particular investors. The custodian then collects the money from each investor, wires it to the issuing bank and holds onto the CD, while issuing a "safekeeping receipt" to the investor indicating that it has title to the CD held by the custodian.

The CD seller's profit (often called the "spread") comes from the difference between the terms of the CD purchased from the bank and the terms on which the CD is sold to the investor. In a simple case, a CD offered by a bank might provide a 5% interest rate on a two-year maturity, which the broker would then offer to the investor as a two-year CD at 4.5% interest, taking the interest-rate difference as profit.

A more complex, and risky, way a CD broker can profit is by mismatching maturity dates. In one form of

1. Robert Bentley established BFS with his brother David Bentley. Robert bought David out in 1993, well before the scheme began.

maturity mismatching,[2] a broker locks in a particular interest rate for a long-term CD and then, rather than selling it as a long-term CD to an investor, sells it as a series of short-term CDs, hoping to profit from the difference between the market rate for interest in short-term CDs and the long-term rate the broker locked in.[3] However, if a purchaser of one of these short-term CDs wants the investment back at the end of the shortened maturity period (rather than rolling over the investment), the broker cannot simply get the principal back from the bank from whom the broker purchased the long-term CD. In those circumstances, the broker typically has three options: (1) find another investor for a new short-term CD and return the outgoing investor's principal from the proceeds of that sale; (2) "warehouse" the long-term CD with a cooperating bank that agrees to purchase the long-term CD temporarily until an investor for a new short-term CD can be found, thus allowing the broker to pay the outgoing investor out of the money loaned by the cooperating bank; or (3) require the investor to stay locked in to the long-term CD until its actual maturity date or until a substitute investor

2. There are multiple forms of mismatching, many of which were used by Bentley as part of his scheme. We focus only on this form—the selling of shortened maturities—in order to provide a general idea of how Bentley's scheme worked. In this regard, unless the context requires otherwise, any reference to Bentley in this subsection A, and subsection B, includes as well BFS and Entrust.

3. The risk to the broker, of course, is that interest rates on short-term CDs will increase higher than the locked-in long-term rate.

can be found to provide the money to pay the outgoing investor. This form of mismatching is legal as long as the mismatch is disclosed to the investor (including the fact that the investor may not be able to reclaim its principal at the maturity date stated in the investment contract).

Bentley's operation deviated from the standard business model described above in at least two crucial respects.[4] First, and most dramatically, in 1996 Bentley started selling fictitious CDs. As his own custodian, he could fool investors by issuing bogus safekeeping receipts. According to Bentley, the decision to sell fake CDs traced back to 1994 or 1995, when Entrust obtained a $2 million credit line, secured by commissions, for cash flow management. In an act that Bentley would later describe as rooted in impatience, he forged his accountant's signature in a letter certifying the collateral. The bank discovered the forgery in 1996 and called the balance on the credit line, threatening Bentley's business. To repay the loan, Bentley created and sold the fictitious CDs. Because Bentley used the proceeds of the sales to pay down the loan—rather than to purchase CDs that would generate interest while retaining the initial investment—he could only pay the investors the interest and principal owed on the fake CDs by obtaining money from new investors (money that, in turn, could not all be used to buy new CDs).

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4. As indicated already, the account that follows simplifies Bentley's scheme.

That was the birth of Bentley's Ponzi scheme.[5] His ability to meet his obligations to past investors depended on his ability to obtain money from new investors, forcing Bentley to continue the scheme or default.

Trying to escape the financial hole he was digging, Bentley pursued a strategy of aggressive maturity mismatching. He purchased long-term CDs, hoping that, if interest rates on short-term CDs went down, he could generate enough from the mismatch that he would no longer need to sell fictitious CDs to meet his obligations as they came due.

That led to a second way in which Bentley's enterprise deviated from an above-board CD brokerage operation. Because Bentley's customer base comprised primarily conservative investors such as credit unions, he failed to disclose the mismatching.[6] Thus, investors who purchased mismatched short-term CDs did not know they were actually purchasing interests in long-term CDs. If such an investor wanted its principal back at the end of the stated (that is, shortened) maturity date, Bentley could not force the investor to stay with

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5. A "Ponzi scheme" gets its name from Charles Ponzi, who was infamous in the early part of the 20th Century for devising a scam operation that paid returns to investors not from the profits earned on investments but from monies paid by later investors.

6. The risk to the investor who purchases a CD with a shortened maturity backed by a CD with a longer maturity is that it might not be able to get the principal out on the shortened maturity date.

the long-term CD without revealing its true nature. Instead, he quickly had to find some way to generate the cash necessary to return the principal, often (when he guessed wrong about the direction of interest rates) by selling another mismatched short-term CD to a new investor at a higher rate of interest than the one he initially got from the bank on the long-term CD.

Thus, though Bentley was in fact purchasing CDs—rather than simply recycling, or embezzling, the money he obtained from investors—his scheme still embodied some of the classic features of a Ponzi. In many cases, investors were not purchasing what they thought they were purchasing. Either (as in the case of the fictitious CDs) there was no underlying CD, or (as in the case of the CDs used as part of Bentley's mismatching strategy) the terms of the underlying CD did not match what had been disclosed to the investor. And Bentley's ability to make good on his obligations to his investors depended in significant part on his finding new investors.

B. Benghiat and Marzouca

This appeal centers on the relationship between Bentley's scheme and two figures who would later become defendants in this case—Ted Benghiat and Joseph Marzouca. Benghiat owned two Florida firms—(1) SFG Financial, Inc. ("SFG"), a CD broker with whom BFS frequently served as a co-broker (with SFG acting as the "wholesale broker," locating available CDs from banks, and BFS acting as the "retail broker," connecting those CDs to particular clients); and (2) Southeastern

Securities, Inc. ("SSI"), a securities firm. Marzouca was Vice-President of Peninsula Bank, a Florida bank that had an ongoing relationship with SFG as a warehouser of its CDs, and that later served as a custodian (along with Entrust) on a number of BFS's sales. When Peninsula Bank and Entrust worked together as custodians, Peninsula Bank acted as the "superior custodian," while Entrust acted as the "sub-custodian." That means that Peninsula Bank would purchase the CD from the bank and hold it, while issuing a safekeeping receipt to Entrust, which would then issue a separate safekeeping receipt to the investor. Graphically depicted, the relationship between the issuing banks, SFG, Peninsula Bank and Bentley's two firms (BFS and Entrust) went as follows:

Banks (CD Issuers)	
SFG (Benghiat) (Wholesale Broker)	Peninsula Bank (Marzouca) (Superior Custodian)
BFS (Bentley) (Retail Broker)	Entrust (Bentley) (Sub-Custodian)

The primary issue in dispute at trial was whether, and to what extent, Benghiat and Marzouca knew about Bentley's scheme. Bentley testified that Benghiat knew Bentley was mismatching maturities without telling his investors and had urged him to disclose it (he did not),

but Bentley did not claim to have told either Benghiat or Marzouca directly about his sale of fake CDs. What is undisputed is that (knowingly or not) Benghiat and Marzouca helped the scheme stay afloat in at least two ways. First, Bentley's investors would sometimes call issuing banks listed on their safekeeping receipts to confirm that the banks really issued the CDs. Because the banks only knew the identities of the superior custodians to which they issued the CDs, they referred questions to Marzouca at Peninsula Bank. He forwarded them to Benghiat, who called Bentley with the names of curious investors. Bentley would then cash the investors out immediately, waiving any penalty associated with early withdrawal, to avoid further questions.

Second, on three occasions Benghiat and Marzouca helped Bentley obtain the cash necessary to keep Bentley's operation afloat. The first of these occasions took place in late 1999. Investors spooked by rumors of a Y2K computer bug[7] refused to roll over their short-term CDs, forcing Bentley to return $138 million in principal. Rates on short-term CDs were rising, souring his gamble on long-term CDs and forcing him to pay higher rates to attract money. Bentley raised most of the cash he needed by finding new investors and liquidating between $5 million and $20 million of his risky long-term CDs on the open market. But he also turned to Benghiat for help.

7. This refers to what, in the period running up to the turn of the millennium, was feared to be a glitch in computer record-keeping where, because of the practice of abbreviating four-digit years to two digits for data-entry purposes, information would be lost in the transition from 1999 to 2000.

Benghiat spoke with Marzouca, and together the three parties engineered what they styled as a "warehousing" transaction between Bentley's operation and Peninsula Bank.[8] Under the arrangement, Peninsula Bank agreed to purchase temporarily up to $10 million in CDs from Bentley in exchange for (1) a non-refundable $100,000 fee to be split between Marzouca and Benghiat, (2) interest on the CDs plus any shortfall between such interest and the prevailing prime rate of interest, and (3) a $1 million security deposit from Entrust intended to cover the difference (if any) between the purchase price of the CDs and the amount for which Peninsula Bank resold them. The deposit was subject to forfeiture if the Bank failed to sell all the CDs within 120 days. Bentley sold $6.8 million in CDs to Peninsula Bank under this arrangement in October and November 1999, repurchasing them within 120 days at a total loss in fees and interest of approximately $300,000. Two more warehousing transactions at virtually the same terms followed in 2000 and 2001.

Finally, Bentley had a side business brokering securities, such as bonds. For about 18 months starting at the end of 1998, he brokered securities for SSI (Benghiat's firm) on a commission basis. Because of this relationship, the National Association of Securities Dealers (NASD), of which SSI was a member, required SSI to supervise Bentley's operation. But, based on

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8. Whether this transaction, and the similar ones that followed, should be characterized as a "loan," rather than a "sale," was subject to much dispute at trial. We take no position.

legal advice it received, SSI concluded that it was not responsible for Bentley's CD business because the Securities and Exchange Commission does not regulate CDs. Benghiat therefore limited SSI's supervision to the (much smaller) non-CD aspects of Bentley's operation. When lawyers for SSI started to worry that the SEC would regulate CDs, SSI (through Benghiat) terminated Bentley in August 2000, citing Bentley's "other activities."

In September 2001, a Texas bank that had purchased fake CDs from Bentley tried to confirm its ownership. As usual, Marzouca forwarded the request through Benghiat to Bentley, who ultimately bought back the fake CDs from the Texas bank after acquiring $7.5 million from Peninsula Bank (in the final of the three warehousing transactions) to do it. But the Texas bank alerted regulators, and, shortly thereafter, the scheme was exposed. Bentley later pled guilty to one count of mail fraud for selling worthless certificates of deposit and one count of bribery (relating to an aspect of the scheme not at issue in this appeal). He was sentenced to 55 months' imprisonment and ordered to pay $38 million in restitution.

C. The Civil Proceedings

In October 2001, the SEC filed a civil action against Bentley, BFS and Entrust (collectively, the "Bentley defendants") in the Eastern District of Pennsylvania. In November 2001, the District Court appointed David H. Marion as receiver for the Bentley defendants

pursuant to 28 U.S.C. § 754, giving him "complete jurisdiction over, and control of all the property, real, personal or mixed, . . . wherever located[,] of [Bentley, BFS, and Entrust]." In August 2002, Marion brought an action (on behalf of BFS only) against, among others, Benghiat, SFG and SSI (collectively referred to hereinafter as "Benghiat") and Marzouca and Peninsula Bank (collectively referred to hereinafter as "Marzouca").[9] As amended, the complaint characterized the action as one "to recover damages from defendants for injuries, losses, obligations and liabilities suffered by and imposed upon [BFS] as a result of, *inter alia*, a fraudulent scheme orchestrated by [Bentley], and others (including the defendants)." The complaint alleged that the defendants had allowed the scheme to succeed "for as long as it did" by, among other things, failing properly to supervise Bentley in the face of a duty to do so, and "infus[ing] the Bentley scheme with additional cash despite knowledge of the precarious financial condition of BFS and its inability to honor its investment contracts."

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9. In addition to this action against Benghiat and Marzouca, various BFS investors later filed an action against them in Pennsylvania state court. In a letter accompanying the writ of summons served on Benghiat and Marzouca in that case, the plaintiffs explained that "we have filed this action as a protective measure in the event the Receiver's claims are dismissed for lack of standing. Assuming resolution of the Receiver's lawsuits fully addresses the pertinent issues, we would have no reason to ever file a Complaint . . . ."

The case was tried in June 2006. On the claims presented to the jury, there were three separate bases for finding liability. The jury could find that, in arranging the three warehousing transactions with Bentley, Benghiat and Marzouca had either (1) aided and abetted, or (2) conspired in, Bentley's fraud.[10] Or (3) the jury could find (with respect to Benghiat only) that he was liable for Bentley's fraud under a *respondeat superior* theory for failing to exercise adequate supervision during the period in which Bentley sold securities for SSI.

In addition, Marion submitted three separate measures of damages to the jury. The first, which came to $32,774,330, corresponded to the sums owed on the "new money" invested in the scheme after August 6, 1999 (when Bentley first enlisted the aid of Benghiat and Marzouca). The second measure, which came to $31,414,979, corresponded to BFS's total insolvency (the difference between its assets and its liabilities) as of October 23, 2001, the day before the receiver was appointed. The final measure corresponded to the amount by which BFS's insolvency increased between August 6, 1999 and October 23, 2001.

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10. It was explained that, to find Benghiat and Marzouca liable on either the aiding and abetting claim or the conspiracy claim, the jury had to find that they were aware of Bentley's scheme when they arranged the different warehousing transactions.

The jury found both Benghiat and Marzouca liable.[11] It assigned damages in the amount of $13,109,732 to Marzouca and $19,664,598 to Benghiat, sums that, when added up, equal the $32,774,330 under the first measure of damages listed above (the "new money" damages).

Benghiat and Marzouca moved for judgment as a matter of law, arguing both that Marion lacked standing to bring the claims presented to the jury and that, at any rate, the evidence did not support the verdict.[12] Marion moved to mold the verdict to reflect joint and several liability. The District Court denied all the parties' motions. Benghiat and Marzouca later moved for relief from judgment, after discovering that Marion purportedly had prevented one of his experts from stating his opinion that there were no damages in the case. The Court denied that motion as well, and both parties appeal from the denial of their various post-trial motions.

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11. The precise ground on which the jury found the defendants liable was not specified. The interrogatory submitted to the jury simply asked (for Benghiat and Marzouca separately) whether each had "conspired with or aided and assisted Robert Bentley in his fraudulent activities." No separate interrogatory was provided for the *respondeat superior* claim, nor were the conspiracy and aiding and abetting claims distinguished.

12. Benghiat and Marzouca also argued that the doctrine of *in pari delicto* (that a plaintiff cannot recover for damages from a defendant when the plaintiff is partly at fault) barred Marion, as a receiver stepping into BFS's shoes, from recovering for harm caused by Bentley's scheme.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to 15 U.S.C. §§ 77v(a) & 78aa over Marion's claims against Benghiat and Marzouca because those claims were ancillary to a suit obtaining judgment against the Bentley defendants under federal securities law. *See Pope v. Louisville, New Albany & Chicago R.R.*, 173 U.S. 573, 577, 19 S. Ct. 500, 43 L. Ed. 814 (1899); *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008). We have jurisdiction under 28 U.S.C. § 1291.

We review a District Court's "denial of judgment as a matter of law *de novo*, viewing the evidence in the light most favorable to the prevailing party." *Acumed LLC v. Advanced Surgical Servs.*, 561 F.3d 199, 211 (3d Cir. 2009) (*quoting Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) (internal quotation marks omitted). For Benghiat and Marzouca's challenge to Marion's standing, we review the District Court's legal conclusions *de novo*, "but review for clear error the factual elements underlying the District Court's determination of standing.") *Gen. Instrument Corp. v. Nu-Tek Elecs. & Mfg.*, 197 F.3d 83, 86 (3d Cir. 1999). For Benghiat and Marzouca's challenge to the sufficiency of the evidence against them, we "may grant . . . judgment as a matter of law contrary to the verdict only if 'the record is critically deficient of the minimum quantum of evidence' to sustain the verdict." *Acumed*, 561 F.3d at 211 (quoting *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1083 (3d Cir. 1995)).

III. Discussion

Benghiat and Marzouca challenge the jury's verdict against them on multiple grounds, including whether Marion had standing to bring the claims on which they were found liable and whether the evidence was sufficient to support the verdict against them. Our case law requires that we side with Marion on the standing issue, but we agree with Benghiat and Marzouca that neither can be liable to Marion (as BFS's receiver) for the actions over which the jury passed judgment.[13]

A. Standing

To begin, we must confront Benghiat and Marzouca's argument that Marion lacked standing to bring the claims presented to the jury. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (explaining that the issue of standing, because it implicates a federal court's authority to hear a case, must be addressed as a threshold matter). Benghiat and Marzouca argue that Marion lacked standing because the injuries for which he sought compensation were those of the investors

13. In challenging the sufficiency of the evidence against them, Benghiat and Marzouca focus particular attention on the argument that the evidence was insufficient to show that they had knowledge of Bentley's scheme when they (allegedly) contributed to it. Because we believe that their contributions to Bentley's scheme, even if knowing, could not give rise to liability to BFS (transferred to Marion standing in BFS's shoes), we do not reach that issue.

victimized by Bentley's scheme, not BFS. Marion concedes that, acting as the receiver for BFS, he could only bring suit to address injuries to BFS. Marion's Br. at 42-43. His argument is that, appearances to the contrary, the harm over which he asked the jury to pass judgment was to BFS.

Intuitively, Benghiat and Marzouca seem correct. That is, this action certainly has the look and feel of an effort to avoid the general rule that an "equity receiver may sue only to redress injuries to the entity in receivership." *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (Posner, J.,); *see also Donell*, 533 F.3d at 777; *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003); *Fla. Dep't of Ins. v. Chase Bank of Tex, N.A.*, 274 F.3d 924, 931 (5th Cir. 2001); *Goodman v. FCC*, 182 F.3d 987, 991-92, 337 U.S. App. D.C. 188 (D.C. Cir. 1999); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990). That is the impression left by some of the remarks made by Marion's counsel to the jury over the course of the trial.

In his opening statement at trial, Marion's attorney asserted that "the purpose of this . . . case is to obtain a verdict so that all the victims of the Bentley scheme can be paid what they [are] owed." In that same statement, he described Marion's job as a receiver as being "to help the victims of the scheme" by first "collect[ing] the money" still existing in the scheme, and then "investigat[ing] . . . to see if claims should be made against all those who worked with [Bentley] so that all

the obligations to the victims can be paid." In asking the jury for damages in his closing argument, Marion's counsel contended that "[f]undamental fairness requires that at a minimum the investors get back the full amount of their principal and the interest they were promised," and described the measure of damages ultimately awarded—the "new money" damages—as "what the receiver needs in order to repay the investors what they are owed."

Marion retorts that more important than these remarks was the District Judge's actual jury charge, to wit:

> The receiver has an obligation to take over the assets of the business . . . , and also is empowered to collect any monies that might be due the businesses.
>
> The lawsuit is an attempt by the receiver to collect money which the receiver claims should be paid to the receivership as due the receivership because of the implication of the defendants in some of Mr. Bentley's activities.

In this context, we do not take the remarks of Marion's counsel as necessarily decisive for standing purposes.[14] Moreover, it is undisputed that Marion was

14. No doubt some of the remarks of Marion's counsel (especially those delivered in his closing argument) implied that the jury's task was to determine whether Benghiat and Marzouca caused the investors compensable injuries. That (Cont'd)

acting for the benefit of the investors (even though he lacked authority to bring claims directly on their behalf). *See Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 795 (6th Cir. 2009) ("[T]he purpose of a receiver [is] to marshal the receivership entities' assets . . . so that the assets may be distributed to the injured parties in a manner the court deems equitable."); *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) ("[A] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate . . . for the benefit of creditors."). As we have explained in the analogous bankruptcy context, it is irrelevant to the issue of standing that "a successfully prosecuted cause of action [will result in] an inflow of money to the estate that will immediately flow out again to repay creditors."[15] *Official*

(Cont'd)

certainly supports the notion that Marion was really pursuing the claims of Bentley's victims. Yet, if there were a cognizable theory of injury underlying Marion's claims, and the problem was simply that his attorney mischaracterized those claims, the remedy would be to order a new trial (provided that the requisite level of prejudice was shown), not to dismiss the case for lack of standing. *See Forrest v. Beloit Corp.*, 424 F.3d 344, 351 (3d Cir. 2005) (explaining that a new trial is warranted when counsel makes "improper statements" and it is "reasonably probable" that the "verdict was influenced by the resulting prejudice"). Because we believe the trial evidence was insufficient to support the verdict, we need not discuss this issue further.

15. A bankruptcy trustee lacks authority to bring a claim directly on behalf of the debtor's creditors. *See Caplin v. Marine Midland Trust Co.*, 406 U.S. 416, 421-34, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972). Thus, the standing issue in the bankruptcy context is the same one we face here—determining to whom the claims being brought belong.

Appendix A

Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 348-49 (3d Cir. 2001).

We thus turn to the heart of the standing issue—whether a distinct injury to BFS underlay Marion's claims. In his supplemental briefing before us, Marion describes his theory of liability as follows: Benghiat and Marzouca, through their actions (and, in Benghiat's case, omissions as well), allowed Bentley's scheme to continue, and this "damaged the responsible corporation (BFS) . . . because . . . it is inevitable in a Ponzi scheme that there will be obligations that the corporation is unable to pay when the scheme is exposed." Marion's Supp'l Br. at 2. In other words, the claim is that Benghiat and Marzouca helped Bentley, and that help harmed BFS because it caused BFS to enter into more losing investment contracts than it otherwise would have. That (according to Marion) is why it was appropriate for the damages awarded to compensate BFS to equal the money owed to investors who came on board after Benghiat and Marzouca's involvement—the harm to BFS was essentially the harm in taking on additional liability to the defrauded investors.[16]

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16. In denying Benghiat and Marzouca's post-trial motion for judgment as a matter of law, the District Court framed Marion's theory as follows: "Bentley . . . breached his fiduciary duty to the corporation by subjecting it to liability for fraud, and [Benghiat and Marzouca] assisted him in doing so." *Marion v. TDI, Inc.*, Nos. 02-7032 & 02-7076, 2006 U.S. Dist. LEXIS 90761, 2006 WL 3742747, at *2 (E.D. Pa. Dec. 14, 2006). The problem here is that an aiding and abetting a breach-of-fiduciary-duty claim was never presented to the jury. The only claims presented were for aiding and abetting, or conspiring in, Bentley's fraud, or otherwise assuming responsibility (in Benghiat's case) for the fraud on a *respondeat superior* theory.

This claim, if plausible (and for purposes of this opinion we assume it is), steps over the relatively low standing threshold. A receiver no doubt has standing to bring a suit on behalf of the debtor corporation against third parties who allegedly helped that corporation's management harm the corporation.[17] Though Bentley controlled BFS, its separate corporate form makes it possible under our precedent to allege that Bentley (and those who helped him) harmed BFS. *See Lafferty*, 267 F.3d at 348 ("In Pennsylvania, as in almost every other state, 'a corporation is a distinct and separate entity, irrespective of the persons who own all its stock.'" (quoting *Barium Steel Corp. v. Wiley*, 379 Pa. 38, 108 A.2d 336, 341 (Pa. 1954))). We found standing to bring a suit with that basic structure in *Lafferty* (albeit in the bankruptcy context), *id.* at 346-354, and other courts have done so specifically in the receiver context. *See, e.g., Donell*, 533 F.3d at 777; *Scholes*, 56 F.3d at 753-54.

We confess to being less comfortable with what Marion's theory identifies as the actual harm to BFS—essentially the harm of being responsible for the injury caused in the first instance to the investors. That seems

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17. Such a suit might, however, be vulnerable to the defense of *in pari delicto*, which embodies the idea "that a plaintiff wrongdoer cannot recover from a defendant wrongdoer." *In re: CitX Corp.*, 448 F.3d 672, 681 n.12 (3d Cir. 2006). However, the *in pari delicto* issue is separate from that of standing, which is what we deal with here. *See Lafferty*, 267 F.3d at 346 (explaining that "[a]n analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*").

to eliminate the cogency of any distinction between harm to the debtor and harm to the creditors. Yet we recognize that Marion's theory of injury finds support in the law of our Court. In *Lafferty*, we held that a creditors' committee, acting on behalf of a corporation, had standing to bring suit against third-party professionals who had allegedly conspired with the corporation's management to prolong the Ponzi scheme operated through it. 267 F.3d at 346-54. We based standing on the notion that, under Pennsylvania law, the third-party defendants, by offering "professional opinions" that were alleged to have wrongfully helped the scheme evade detection, had injured the corporation by deepening its insolvent condition. *Id.* at 347.

Thabault v. Chait, 541 F.3d 512 (3d Cir. 2008), is even more helpful to Marion. There we held that a corporation suffered injury "separate from an injury to its creditors" when allegedly negligent auditing allowed it to write insurance policies that it lacked the reserves to cover, a conclusion we based on the notion that "an increase in liabilities is a harm to the company."[18] *Id.* at 523; *see also id.* at 521 ("[T]he damages here are losses incurred on insurance policies that would not have been written but for [the auditor's] negligence."). That seems to be more or less the theory on which Marion

18. *Thabault* does not appear to have addressed the issue of standing directly. Its discussion of what constitutes a distinct injury to the insurance company arose in the context of considering a challenge to the damages awarded to the receiver for that company. *Id.* at 518-23.

proceeded—that Benghiat and Marzouca injured BFS because their actions led it to take on additional liability to the investors.

With our case law framing the context, we conclude that Marion sufficiently alleged an injury distinct to BFS (suffered at the hands of Benghiat and Marzouca) to get past the standing threshold. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (explaining that standing requires (1) a cognizable injury suffered by the plaintiff, that is (2) fairly traceable to the challenged actions of the defendant, and (3) redressable by a court). Probing Marion's theory any further would, we believe, take us into a discussion of the merits of his claims, something separate from the standing inquiry. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . .").

B. The Merits

We turn to the merits directly, and here the outcome is less happy for Marion. There are two factual determinations that the jury could have made in finding both Benghiat and Marzouca liable—(1) that Benghiat and Marzouca helped Bentley infuse cash into his operation knowing that the money would be used to keep the scheme afloat; and (2) (in Benghiat's case only) that he failed to exercise adequate supervision over

Bentley's CD-brokerage operation during a time in which Bentley sold securities for SSI.[19]

Neither of those findings, however, could give rise to liability to Marion standing in BFS's shoes. In the case of the first finding, the requisite causal link between Benghiat and Marzouca's actions and the harm BFS allegedly suffered (*i.e.*, economic loss) is missing. In the case of the second finding, the relevant breach of a duty would have been to the investors, not BFS. Thus, in neither case is the verdict supported by the evidence.

1. The Warehousing Transactions

In instructing the jury, the District Court summarized Marion's theory with regard to the warehousing transactions entered into between Bentley, Benghiat and Marzouca as follows:

> [T]he fundamental contention is that if the money had not been put up by [Peninsula Bank when it was,] . . . the fraudulent scheme would have terminated at that time because Mr. Bentley was running out of money and could not have continued and, therefore[,] . . . the damages amount to all of the money that was invested in the receivership estate after the loan was agreed to.

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19. Because the jury found both Benghiat and Marzouca liable, it had to have found (1) to be true. We do not know whether it also found (2) to be true, and can only speculate that it did based on its having apportioned more liability to Benghiat than Marzouca.

This cannot serve as a basis for finding Benghiat and Marzouca liable to Marion (substituting for BFS). Our cases make clear that there cannot be liability to a corporation for increasing its short-term liquidity. This is so even where (as alleged here) the new money brought into the company allowed it to stay afloat long enough to put itself in a worse position than it was in prior to the cash infusion. *See In re CitX Corp.*, 448 F.3d 672, 677-78 (3d Cir. 2006); *Thabault*, 541 F.3d at 521.

The problem in this kind of scenario is one of proximate causation. Between the initial act (the injecting of money into the business) and the end result (the expansion of the company's debt relative to where it was prior to the cash infusion) stand the intervening acts of the company's management (*i.e.*, what it chose to do with the money). We illustrated this point in *CitX*. There the trustee for a company that had operated a Ponzi scheme brought suit against the company's accounting firm, arguing that the firm's negligent financial reports had allowed it to hide its true financial condition from investors, thus raising more money and eventually going even deeper into debt. 448 F.3d at 674-78. We held that a jury could not conclude that the accounting firm had caused the company's economic injuries on those facts, reasoning as follows:

> [CitX argues] that the $1,000,000 equity investment allowed CitX to exist long enough for its management to incur millions more in debt. But that looks at the issue through hindsight bias. . . .[T]he equity investment was

> hardly harmful to CitX. Its management. . . misused the opportunity created by that investment; . . . and therein lies the harm to CitX.

Id. at 677-78; *see also Thabault*, 541 F.3d at 521 ("To the extent that the extra capital, which decreased CitX's insolvency, extended the corporation's life and allowed management to incur more debt, the ultimate harm was caused by mismanagement, not the auditor."). For just that reason, the warehousing transactions cannot serve as basis for Benghiat and Marzouca's liability to BFS (even if engineered with full awareness of Bentley's scheme). The losses BFS suffered as a result were proximately caused by Bentley's subsequent actions, not the cash infusion itself.[20]

2. Benghiat's Supervision of Bentley's Operation

The other basis for finding liability (with respect to Benghiat) related to the roughly 18 months during which Bentley brokered securities under the supervision of SSI (Benghiat's firm). Pre-trial, it was a matter of considerable dispute whether Benghiat's duty to supervise Bentley's sales of securities at SSI extended

20. We take no position on whether, in a suit brought by the investors against Benghiat and Marzouca, the same proximate cause problem would arise. An investor suit might bring in a wider scope of activity than this one—what Benghiat and Marzouca allegedly helped Bentley do to the investors. Here, our focus is simply on what transpired among Benghiat, Marzouca and BFS and our conclusion that the transactions at issue did not harm BFS.

to his CD-brokerage operation, since CDs purchased from federally regulated banks are not generally considered securities for purposes of federal securities law. *See Marine Bank v. Weaver*, 455 U.S. 551, 558-59, 102 S. Ct. 1220, 71 L. Ed. 2d 409 (1982). The position ultimately taken by the District Court (and charged to the jury) was that "[t]o the extent that [Bentley] altered the terms of [the] certificates of deposit, the certificates themselves would be considered securities, and to the extent that he issued what amounted to investment contracts certifying that he was investing or had invested, those certificates he issued would qualify as securities."

We need not decide whether the District Court was correct to conclude that, insofar as Bentley was brokering fake CDs, he was selling securities, and thus that Benghiat had a duty to supervise that aspect of Bentley's operation as well. That is because, even if Benghiat had such a duty, it ran to the investors who purchased the fake CDs, not to BFS, the company through which the fake CDs were sold.

In his complaint, Marion asserted that Benghiat is secondarily liable under section 20(a) of the Securities Exchange Act of 1934 for Bentley's violations of SEC Rule 10b-5, which prohibits fraudulent schemes and devices in connection with the sale of securities.[21] Section 20(a) provides in pertinent part that

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21. Rule 10b-5 makes it "unlawful . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection (Cont'd)

> [e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with[,] and to the same extent as[,] such controlled person to any person to whom such controlled person is liable . . . .

15 U.S.C. § 78t(a). In the context of the "broker-dealer" relationship like the one at issue here, we have described section 20(a) as imposing "a stringent duty to supervise employees." *Rochez Bros. Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975).

But, even though section 20(a) could make Benghiat liable for Bentley's Rule 10b-5 violations in the right circumstances, we do not see how it could make Benghiat liable to BFS (and thus Marion) for those violations. To make out a securities fraud claim under Rule 10b-5, "a plaintiff must show that '(1) the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading; (2) the defendant acted with scienter; and (3) the plaintiff's reliance on the defendant's

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(Cont'd)

with the . . . sale of any security." 17 C.F.R. § 240.10b-5. It implements section 10(b) of the Securities Exchange Act of 1934, which makes it "unlawful" to "use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b).

misstatement caused him or her injury.'" *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 268 (3d Cir. 2005) (quoting *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004)). Plainly, BFS could not establish the third of these elements against Bentley—that it was caused harm through its reliance on Bentley's deceit. BFS did not rely on Bentley's misrepresentations. Rather, as we said earlier, any harm to it was brought about by becoming liable for Bentley's fraud on the investors.

If Bentley could not be liable to BFS for violating Rule 10b-5, then Benghiat could not be secondarily liable to BFS for Bentley's violation. The liability section 20(a) imposes on "controlling persons" is specifically liability to those "*to whom [the] controlled person is [also] liable.*" § 78t(a) (emphasis added). In this case, that could only be the defrauded investors. Section 20(a) therefore cannot support the use to which Marion put it here—to impose a duty on Benghiat to BFS to prevent Bentley from defrauding the investors. Because Bentley's duty under Rule 10b-5 not to defraud his investors only ran to them, any corresponding supervisory duty Benghiat might have had only ran to those investors as well.

Once again, the facts we presume were found by the jury (in this instance, that Benghiat provided inadequate supervision of Bentley's activities at SSI) cannot support liability to Marion. If Benghiat did breach a duty to supervise under these facts, it was a duty owed to Bentley's investors, not to the corporation through which the securities were sold.

Appendix A

* * * *

We conclude that, based on our case law, Marion did have standing to bring the claims presented to the jury. However, we also conclude that, on the facts presented to the jury, neither Benghiat nor Marzouca can be liable to Marion acting as BFS's receiver. Accordingly, we reverse the District Court's denial of Benghiat and Marzouca's post-trial motion for judgment as a matter of law and remand with instructions to enter judgment in favor of the defendants.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (DECEMBER 15, 2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION

NO. 02-7032

DAVID H. MARION, as Receiver
for Bentley Financial Services, Inc.

v.

TDI, INC. (f/k/a Traders and
Dealers, Inc., f/k/a The
Trading Desk, Inc. and f/k/a
U.S. Central Securities, Inc.),
SOUTHEASTERN SECURITIES, INC.,
SFG FINANCIAL SERVICES, INC.,
PENINSULA BANK, THEODORE
BENGHIAT, CASTO EDWIN RIVERA,
JERRY MANNING, JOHN STRINE,
JEFFREY WILSON and
JOSEPH MARZOUCA

Appendix B

CIVIL ACTION

NO. 02-7076

DAVID H. MARION, as Receiver
for Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY and
SANFORD GOLDFINE

MEMORANDUM AND ORDER

Fullam, Sr. J. December 14, 2006

At a ten-day jury trail, plaintiff, David H. Marion, Receiver for Bentley Financial Services, Inc., recovered substantial jury verdicts against two sets of defendants, the "Peninsula Bank Defendants" and the "Benghiat Defendants." Now pending are defendants' renewed motions for judgment as a matter of law or for a new trial, and plaintiff's motion to mold the verdicts.

The underlying facts are well known to the parties and need not be set forth in detail. Briefly, a gentleman named Robert Bentley conducted an elaborate Ponzi scheme, and bilked many investors of millions of dollars. On October 23, 2001, the Securities and Exchange Commission filed an action in this court which had the effect of immediately closing down Mr. Bentley's operations. The SEC obtained the appointment of Mr.

Marion as receiver for all of the Bentley entities. The SEC's motion succinctly described the scheme, as follows:

> "Defendants [Robert L. Bentley, Bentley Financial Services, Inc. And Entrust Group], operating as an unregistered broker-dealer, are fraudulently representing that they are selling FDIC-insured bank-issued CDs when in fact they are issuing private notes. Rather than an insured bank standing behind the defendant's promise to pay back principal to investors on maturity, it is only their own ability to find more victims that allows them to pay principal to investors when due. Also, a large number of CDs that defendants buy with investor funds are callable. Because defendants have refused to comply with subpoenas issued by the SEC, plaintiff cannot determine if defendants in fact hold actual CDs for every note they have issued. There are currently at least $318 million of such fraudulently-issued notes outstanding in the hands of more than 3,000 investors nationwide. Most of the investors are small credit unions, banks, and savings and loan institutions."

Mr. Marion, in his capacity as receiver, alleged in the present action that the defendants conspired with or aided and abetted the fraudulent scheme. The evidence at the trial permitted the jury to find that, between April 1999 and October 23, 2001 (the date when the SEC closed

down the Bentley operations), the defendants provided Mr. Bentley with approximately $10 million in financing, thus enabling Mr. Bentley to prolong the life of the Ponzi scheme. During that period, Mr. Bentley's scheme obtained additional investments from defrauded investors totaling $269,455,213. While some of these investments resulted in the purchase of actual CDs which were still on hand when the scheme was shut down, the principal amount of CDs on hand as of October 23, 2001 was approximately $23 million less than the principal amount the investors had purchased, and that figure does not include $9,440,000 in unpaid (and unpayable) interest. Thus, it was the Receiver's contention that the defendants' assistance to Mr. Bentley caused additional losses to the investors totaling $32,774,330.

The crucial issue at trial was whether the defendants knew that Mr. Bentley was engaged in a fraudulent scheme, when they provided the funds which enabled him to continue in business. There was, in my view, ample evidence which permitted the jury to find that the defendants either had actual knowledge of the Ponzi scheme itself, actual knowledge of facts which demonstrated that Mr. Bentley was defrauding investors, or were chargeable with willful blindness. Moreover, it is undisputed that, between July 1998 and August 2000, Mr. Bentley was a registered representative employed by the Benghiat firm. Thus, the Benghiat defendants had an obligation to supervise Mr. Bentley's activities, and could properly be held liable for failing to do so.

Appendix B

MOTIONS FOR JUDGMENT AS A MATTER OF LAW

Defendants advance three principal arguments in support of their motions for judgment as a matter of law. They contend (1) that the evidence was insufficient to support the jury's verdict; (2) that Mr. Marion lacked standing to pursue this action; and (3) that the doctrine of *in pari delicto* precludes recovery.

As discussed above, I am satisfied that the evidence amply supported the jury's verdict. It was clear that the defendants supplied funds to Mr. Bentley and his organizations in the knowledge that they desperately needed cash. But, if Mr. Bentley and Bentley Financial Services were acting properly in their role as CD brokers, and if Entrust Group really was acting as independent custodian, it is inconceivable that they would have needed to borrow money from defendants in order to satisfy their investors. Moreover, Mr. Bentley himself testified that all of the defendants were at least aware that the CDs he actually purchased did not "match" the CDs his investors thought they were obtaining. Mr. Bentley's testimony alone would suffice for the imposition of liability in this case, and the jury was entitled to credit that testimony.

Defendants also contend that they are entitled to judgment as a matter of law because Mr. Marion lacked standing to pursue this litigation, and because the entities for which he is Receiver were wrongdoers who primarily caused the losses, recovery of which is now

being sought. At an earlier stage, I rejected these arguments in denying defendants' motion to dismiss and, notwithstanding defendants' earnest arguments, I remain persuaded that Mr. Marion has standing to pursue these claims, and is not barred by the *in pari delicto* doctrine.

I recognize that a trustee in bankruptcy would not have standing to pursue claims on behalf of creditors defrauded by the debtor and others acting in concert with the debtor. If the debtor was a wrongdoer, the *in pari delicto* doctrine would preclude recovery. And, in any event, the claims belong to the defrauded creditors, not the bankrupt estate. But a bankruptcy proceeding differs significantly from an equity receivership imposed at the request of a government agency such as the SEC. The whole purpose of the SEC proceeding is to remedy violations of the securities laws for the benefit of investors.

The order appointing Mr. Marion as Receiver provided that he "shall have complete jurisdiction over, and control of all the property, real, personal or mixed, including any assets or funds, wherever located, of all defendants." One of these entities was Bentley Financial Services, Inc., a corporation. Thus, Mr. Marion has the right to pursue the cause of action which was the property of Bentley Financial Services - i.e., a claim that its officer, Mr. Bentley, breached his fiduciary duty to the corporation by subjecting it to liability for fraud, and that the Peninsula Bank and Benghiat Defendants assisted him in doing so.

As everyone recognizes, Mr. Marion is pursuing this litigation on behalf of the defrauded investors, not Mr. Bentley. Neither Mr. Marion nor the investors are wrongdoers; the *in pari delicto* doctrine does not bar the recoveries being sought in this case.

In addition to the three issues discussed above, the defendants have included an argument to the effect that there was no basis for the jury's conclusion that the funds advanced to Mr. Bentley by the defendants caused the Ponzi scheme to continue longer than it otherwise would have. The contention is, as I understand it, that even if the defendants had not advanced Mr. Bentley the $10 million, the Ponzi scheme might well have continued in existence: Mr. Bentley could simply have liquidated some of the CDs he had on hand, and thus continued to operate his scheme. In other words, defendants should not be held liable for knowingly assisting Mr. Bentley in perpetuating the scheme because he might have been able to obtain financing from sources unaware of the nature of the scheme (or from other wrongdoers). The fallacy of this argument is, I believe, self-evident.

MOTION FOR A NEW TRIAL

For the reasons thus far discussed, I have concluded that the defendants are not entitled to a new trial on the theory that the verdict was against the weight of the evidence. The defendants advance the further argument that a new trial should be ordered because the defendants were prejudiced by the admission of

evidence charging them with negligence in failing to learn that "Entrust Group" was not a corporation but merely a sole proprietorship owned by Mr. Bentley. The evidence in question was admissible, however, on the issue of whether the defendants were chargeable with willful blindness. The jury was specifically, and repeatedly, instructed that the defendants could not be held liable unless the jury was satisfied that they either had actual knowledge of the fraudulent nature of Mr. Bentley's activities which they were assisting in, or entertained suspicions which they intentionally chose not to pursue because they did not want to learn the facts.

MOTION TO MOLD THE VERDICT

With the agreement of counsel for all the parties, the jury was asked to render its verdict by responding to interrogatories. Counsel participated in the drafting of these interrogatories, and approved the final form submitted to the jury. The interrogatories, and the jury's responses, were as follows:

> 1. Do you find that the Peninsula Defendants (Peninsula Bank and Joseph Marzouca) either conspired with or aided and assisted Robert Bentley in his fraudulent activities?
>
> Yes X No _____

Appendix B

a) If your answer is "Yes" to Interrogatory 1 above, what is the amount of damages the Peninsula Defendants caused the Receivership Estate to sustain?

$13,109,732

2. Do you find that the Benghiat Defendants (Ted Benghiat, SFG and Southeastern) either conspired with or aided and assisted Robert Bentley in his fraudulent activities?

Yes X No

a) If your answer is "Yes" to amount . . . caused the Receivership Estate to sustain?

$19,664,598

Plaintiff now contends that, since the jury found that the defendants were intentional wrongdoers, each set of defendants should be held liable for the total amount of damages found by the jury. Plaintiff seeks to have the verdict molded so as to represent a judgment against each set of defendants for the total amount, $32,774,330. Defendants, understandably, contend that the court has no authority for increasing the judgment as to each set of defendants, and that to do so would be inconsistent with defendants' constitutional right to a jury trial. Plaintiff counters with the argument that, in the discussions which preceded the submission of the case

to the jury, when the issue of joint and severe liability was mentioned, and when counsel expressly requested that the jury be asked to make separate damage findings against each set of defendants, defense counsel made statements which reflected a willingness to have the jury verdict molded if necessary, after the jury returned a verdict.

The record is very clear that both sides wanted the jury to make separate damage findings as to each set of defendants. Indeed, after the jury's answers to the interrogatories were read, in making sure that all of the jurors agreed with the answers, I stated:

> "So, basically, you're saying that you have concluded that the Peninsula Defendants are liable in the total of $13,109,732, and that the Benghiat Defendants are liable in the total amount of $19,664,598. Do you all agree on that? And the jury responded, "Yes, Your Honor."

The jury has spoken. I am not persuaded that there is any basis upon which this court would be justified in disregarding the jury's findings, and, in effect, increasing the liability of each set of defendants.

Plaintiff stresses the fact that the total of the amounts assessed against each set of defendants by the jury coincides with the total amount of damages sought by plaintiff, as calculated by plaintiff's expert witness, Mr. Brulenski. But this was only one of several

calculations which plaintiff submitted to the jury for their consideration. It is simply not possible at this point to determine precisely what the jury's reasoning may have been. There was evidence which would have permitted the jury to fix the damages at lower amounts than the amounts set forth in the answers to interrogatories, and there was evidence to support the notion that the defendants' conspiracy with and assistance to Mr. Bentley covered different periods of time, and may have had disparate impacts upon the continuation of the scheme.

Be that as it may, I am satisfied (1) that, if it was an error not to instruct the jury about the joint liability of conspirators, the error was invited, and (2) that it would be necessary to grant a new trial, as to damages, to achieve the result now being sought by plaintiff's motion to mold the verdict. Plaintiff has not sought a new trial.

Finally, as a practical matter, given the size of the jury's verdict, and the arguments made by defense counsel about the limited resources of their respective clients, the difference between joint liability and individual liabilities may be academic.

CONCLUSIONS

The jury's verdict was amply supported by the evidence. There is no basis for granting a new trial, or for molding the verdict. An Order to that effect follows.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING (AUGUST 31, 2010)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-5173

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

TDI INC, (f/k/a Traders and Dealers, Incorporated, f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc., SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

SANFORD GOLDFINE; S.D. GOLDFINE & CO.; (Third-Party Defendants)

Appendix C

(D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.;

(D.C. No. 02-cv-07076)

Peninsula Bank; Joseph Marzouca,
Appellants (No. 06-5173)

No. 06-5196

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

Appendix C

TDI INC, (f/k/a Traders and Dealers, Incorporated, f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc., SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

SANFORD GOLDFINE; S.D. GOLDFINE & CO.; (Third-Party Defendants)

(D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; JERRY MANNING; JOSEPH MARZOUCA; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.,

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(D.C. No. 02-cv-07076)

Southeastern Securities, Inc.; SFG Financial Services, Inc.; Theodore Benghiat, Appellants (No. 06-5196)

No. 07-1010

DAVID H. MARION, as receiver for Bentley Financial Services, Inc., Appellant (No. 07-1010)

v.

TDI INC, (f/k/a Traders and Dealers, Incorporated, (f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc.; SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

SANFORD GOLDFINE; S.D. GOLDFINE & CO.; (Third-Party Defendants)

Appendix C

(D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; JERRY MANNING; JOSEPH MARZOUCA; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.;

(D.C. No. 02-cv-07076)

No. 07-3398

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

TDI INC, (f/k/a Traders and Dealers, Incorporated,

Appendix C

f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc.; SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT, CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

SANFORD GOLDFINE; S.D. GOLDFINE & CO.; (Third-Party Defendants)

(D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD GOLDFINE; JEFFREY WILSON; JERRY MANNING; JOSEPH MARZOUCA; THEODORE BENGHIAT; PENINSULA BANK; CASTO EDWIN RIVERA; SFG FINANCIAL SERVICES, INC.; SOUTHEASTERN SECURITIES, INC.; JOHN STRINE; THE TRADING DESK, INC. d/b/a TDI, INC.

Appendix C

(D.C. No. 02-cv-07076)

Peninsula Bank; Joseph Marzouca,

Appellants (No. 07-3398)

No. 07-3416

DAVID H. MARION, as receiver for Bentley Financial Services, Inc.

v.

TDI INC, (f/k/a Traders and Dealers, Incorporated, f/k/a TDI, Incorporated, f/k/a The Trading Desk, Inc. and f/k/a U.S. Central Securities, Inc.; SOUTHEASTERN SECURITIES INC.; SFG FINANCIAL SERVICES, INC.; PENINSULA BANK; THEODORE BENGHIAT; CASTO EDWIN RIVERA; JERRY MANNING; JOHN STRINE; JEFFREY WILSON; JOSEPH MARZOUCA

v.

SANFORD GOLDFINE; S.D. GOLDFINE & CO.; (Third-Party Defendants)

Appendix C

(D.C. No. 02-cv-07032)

DAVID H. MARION, as receiver for
Bentley Financial Services, Inc.

v.

S.D. GOLDFINE & COMPANY; SANFORD
GOLDFINE; JEFFREY WILSON; JERRY
MANNING; JOSEPH MARZOUCA;
THEODORE BENGHIAT; PENINSULA BANK;
CASTO EDWIN RIVERA;
SFG FINANCIAL SERVICES, INC.;
SOUTHEASTERN SECURITIES, INC.;
JOHN STRINE; THE TRADING DESK, INC.
d/b/a TDI, INC.;

(D.C. No. 02-cv-07076)

Southeastern Securities, Inc.; SFG Financial
Services, Inc.; Theodore Benghiat,

Appellants (No. 07-3416)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 02-cv-07032/76)
District Judge: Honorable John P. Fullam

Appendix C

Before: McKEE, *Chief Judge*, SLOVITER, SCIRICA, BARRY, AMBRO, FUENTES, FISHER, CHAGARES, JORDAN, WEIS* and VAN ANTWERPEN**, *Circuit Judges*

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

The petition for rehearing filed by Appellee/Cross-Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

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*Honorable Joseph F. Weis, Jr., Senior Judge, is limited to panel rehearing vote only.

**Honorable Franklin S. Van Antwerpen, Senior Judge, is limited to panel rehearing vote only.

Appendix C

Dated: August 31, 2010

clc\cc: David D. Langfitt, Esq.
John H. Lewis, Jr., Esq.
Eugene E. Stearns, Esq.
Laurence A. Mester, Esq.
Alan K. Cotler, Esq.

APPENDIX D — SECTION 10(b) AND SECTION 20 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. §§ 78j(b) AND 78t(a), AND RULE 10b-5 PROMULGATED BY THE SECURITIES AND EXCHANGE COMMISSION, 17 C.F.R. § 240.10b-5.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b):

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

> **(b)** To use or employ, in connection with the purchaser or sale of any security registered on national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors.

Appendix D

Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78t(a):

§ 78t. Liability of controlling persons and persons who aid and abet violations

(a) Joint and several liability; good faith defense

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulations thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Rule 10b-5 promulgated by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5:

§ 240.10b-5 Employment of manipulative and deceptive devices.

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operate or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.